UNG ENG HUAT & ANOR

v.

ARAB-MALAYSIAN BANK BHD

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: MT(2) 22-76-99]
12 MAY 2003

BANKING: *Banks and banking business - Cheque - Non-payment of cheque - Alteration to cheque - Whether plaintiffs had altered and authorised cheque - Whether holder of cheque had knowledge of alteration - Whether bank empowered to deny payment of cheque - Whether defendant duty-bound to inform plaintiffs of alteration - Whether cheque dishonoured only because of alteration*

The first plaintiff operated a current account with the defendant, and had, when necessary, used cheques from it to pay for any shares purchased. The second plaintiff was the first plaintiff's wife. The first plaintiff issued such a cheque from the said account for the payment of shares bought from a stockbroker company called Mercury Securities Sdn Bhd. The cheque was banked in, but regretfully, payment could not be met. Being aggrieved with this non-payment, the plaintiffs filed a suit against the defendant alleging, *inter alia*, that the defendant, by mistake and/or negligence on its part, had breached a contract or its responsibility by dishonouring the said cheque.

The plaintiffs alleged that due to the legend of "our crossing cancelled" being endorsed on it by the defendant, the disbursement of money was disallowed. The plaintiffs further asserted that the defendant had a responsibility to check with them before they rejected the cheque, and that by the defendant's act, the plaintiffs had been defamed, as it naturally suggested that the plaintiffs were without sufficient funds in the account. The plaintiffs also contended that, by virtue of the rejection of the cheque, it had suffered financial loss and that the first plaintiff's reputation as a well-known businessman had been similarly smeared. The defendant, however, averred that it had never written or printed the words "our crossing cancelled", and that it had merely exercised its contractual rights in rejecting the cheque after finding a material alteration, and therefore had not committed any error or been negligent with that controversial refusal. It further maintained that no defamation had been intended, and that it was under no obligation to refer or check with the plaintiffs on any matter as alleged.

Held:

[1] Under s. 64(2) of the Bills of Exchange Act 1949 ('the Act'), if that bill or the impugned crossed cheque was materially altered without the assent of all parties liable on that document, that cheque would be avoided except against a party that had made, authorised or assented to the alteration, and subsequent indorsers. Since the plaintiffs had denied altering and authorising it, then that bill or cheque would be avoided for good. The drawee bank thus would be discharged of its contractual liability to pay up unless the alteration was not apparent to the holder of the bill. "Apparent" must mean that the material alteration in the bill was discoverable by simple inspection on the part of the holder due to its obviousness. On the facts, the holder of the bill was Mercury Securities; however, there was no evidence adduced to indicate whether Mercury Securities had actually and knowingly scrutinised the cheque and knew of that material alteration before its presentation. This, coupled with the plaintiffs' failure to call Mercury Securities to testify, rendered the plaintiffs' case a non-starter. (pp 633 g - 634 b & 636 a-b)

[2] On the facts, the power of the defendant bank to deny payment of the cheque did not emanate from the proviso in s. 64 of the Act, but from the terms and agreement executed by both parties, as provided for in the "Rules of Current Account", which empowered the bank to reject cheques flawed by technical defects. Therefore, the subjective view of the banker must accordingly take a front seat. Furthermore, it was obvious that the impugned cheque had been altered or amended from a figure that looked like "7" or "8" to "9", and such an amendment was a material alteration in law. In addition, there were no cogent reasons to show that the defendant was duty-bound to inform the plaintiffs every time an alteration was found, and there was also no evidence adduced by the plaintiffs to establish that the defendant had endorsed the cheque with a prohibition of "our crossing cancelled", thus disallowing any form of disbursement of money. The evidence was overwhelming that the rejection of the cheque based on the material alteration was the only reason for it being dishonoured. (pp 637 b, 638 a, c & 640 a-e)

[Claim dismissed.]

Case(s) referred to:
Automobile Finance Corp of Australia Ltd v. Law [1933] 49 CLR 1 ***(refd)***
Barbour Bank Ltd v. Ho Hong Bank Ltd [1929] SSLR 116 ***(refd)***
Bintai Kindenko Pte Ltd v. Sanwa Bank Ltd & Anor [1994] 3 SLR 459 ***(refd)***
Crouch v. The Credit Foncier of England Ltd [1872] 8 LRQB 374 ***(refd)***
Hirschmann v. Budd [1873] LTR 602 ***(foll)***
Koch v. Dicks [1933] 1 KB 307 ***(refd)***
Leeds and County Bank, Ltd v. Walker [1883] Vol XI QBD 84 ***(refd)***
London Joint Stock Bank Ltd v. MacMillan and Arthur [1918] AC 777 ***(refd)***
M/s Gupta Biscuits (P) Ltd v. United Commercial Bank [1988] AIR Cal 265 ***(refd)***
Oriental Bank of Malaya v. Rubber Industry (Replanting) [1957] MLJ 153 ***(refd)***
Outhwaite v. Luntley [1815] 4 Camp 179 ***(foll)***
RMNL Letchunan Chettiar v. ALV Alagappa Chettiar [1934] 3 MLJ 5 ***(refd)***
Vance v. Lowther [1876] LTR 286 ***(refd)***
Woollatt v. Stanley [1928] All ER 106 ***(refd)***
Yogambikai Nagarajah v. Indian Overseas Bank [1979] 1 MLJ SLR 258 ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 2, 3(1), 64(1), (2), 73

Bills of Exchange Act 1882 [UK], s. 64

Other source(s) referred to:
Poh Chu Chai, *Law of Negotiable Instruments*, 5th edn, p 3

For the plaintiff - Tabian Tahir (Patrick Dass); M/s Tabian Tahir & Co
For the defendant - Peter KL Chen (SP Tan); M/s Abd Aziz, Chen & Co

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar J:

The first plaintiff has a business concern, and allegedly owns substantial shares in many other companies, whilst the defendant a financial institution, is operating in Kota Bharu, Kelantan. The second plaintiff is the wife of the first plaintiff. As per the statement of claim, the first plaintiff had operated a current account with the defendant (hereinafter referred to as the 'said account'), and had when necessary used cheques from it, *inter alia*, to pay for any shares purchased.

On 31 May 1999 the first plaintiff had issued a cheque from the said account, bearing the serial number of 004308 (hereinafter referred to as the 'said cheque'), for the payment of shares bought from a stockbroker company called Mercury Securities Sdn Bhd. The sum written in that cheque was only for a mere sum of RM33,098.39. On or about the same date the cheque was issued and received, the first plaintiff, his agent or representative banked it in for Mercury Securities Sdn Bhd. at the Maybank branch of

Kota Bharu. Regretfully payment could not be met. The plaintiffs also alleged that due to the legend of "our crossing cancelled" being endorsed on it, and accusing the defendant of being the culprit, disbursement of money was disallowed. Being aggrieved with this non-payment, a suit was filed against the defendant alleging, *inter alia*, that by mistake and or negligence on its part, had breached a contract or responsibility by the dishonouring of the said cheque.

The plaintiffs had further asserted that the defendant had a responsibility to check with them beforehand before rejecting the cheque. It was reasonable in the circumstances of the case for the defendant to inquire from the plaintiffs about the cheque, when the said account had a credit sum of RM479,327.51 at the material time *vis-a-vis*, the negligible amount stated on the cheque. In the alternative, the defendant was negligent when it had wrongfully returned the cheque to Mercury Securities Sdn. Bhd. By the acts of the defendant the plaintiffs had implicitly been defamed, as by the natural and ordinary meaning of its act, it had carried the message that the plaintiffs was without sufficient funds in the account. By virtue of the rejection of the cheque, the plaintiffs had suffered financial loss, with the first plaintiffs reputation as a well-known businessman, being similarly smeared. In the prayers, as per the statement of claim, the plaintiffs had demanded RM30,000,000 for specific damages, general damages, exemplary damages, punitive damages and interest.

Not unexpectedly, the defendant had denied all the allegations, and in reply had averred that the refusal of payment was not because of the cancellation of the crossing, but for some other practical reason. The defendant had alleged that it had never written or printed the words "our crossing cancelled" as alleged, and as such there was nothing actionable against it. It also denied any cancellation of the cheque. According to it, the cheque was rejected as after it was received on 1 June 1999 and after undergoing administrative processing, an alteration was detected. Based on that finding the said cheque was returned to the abovementioned Malayan Banking Berhad.

The defendant clarified that the right to reject any cheque on certain grounds, were founded on the terms of the agreement executed by both parties, among others, to adhere and be subject to the contents of the "Rules of the Current Account". Pursuant to cls. 21, 26 and 27 of the Rules of the Current Account", the parties were subject to the Rules and Regulations of the Association of the Banks in Malaysia. Under the latter rules and regulations, the defendant was entitled to reject any cheque, which contained

technical mistakes, not restricted to amendments. Here it had merely exercised its contractual rights after finding a material alteration, and thus had not committed any error or had been negligent with that controversial refusal. Certainly no defamation was intended. The defendant further asserted that it was under no obligation to refer or check with the plaintiffs on any matter as alleged.

Further to the above, the defendant replied that the refusal to honour the cheque was the result of the plaintiffs failing to ensure that the cheque was in order, and failing to adhere fully to the requirements of the "Rules of the Current Account." The defendant wound up its rebuttal by ventilating that the plaintiffs had suffered no loss, and as such the case should be dismissed with costs.

Due to the nature of the factual matrix of the case, these questions had to be resolved by me, namely:

1. what a cheque is;
2. its status in the banking institution;
3. the law that governs it;
4. whether a bank could refuse payment if there was any alteration or amendment to it;
5. the level of the test on such matters;
6. whether the alteration or amendment in the circumstances of the case was sufficiently apparent;
7. whether the defendant as per the facts, and in the circumstances of the case, was required to refer to the plaintiffs first before taking further action; and
8. whether the plaintiffs had proven their case.

The Malaysian Bills of Exchange Act 1949 (hereinafter referred to as the Act) is substantially in *pari materia* with the law codified in the English Bills of Exchange Act 1882. The Malaysian Legislators also have incorporated into the 1949 Act the provisions of the English Cheques Act 1957, and as such Malaysia has preserved substantially the applicability of English common law and its mercantile law (*Law of Negotiable Instruments* 5th. edn by Poh Chu Chai).

In ordinary parlance, a cheque is a documentary order signed by the maker or drawer, drawn upon a bank and payable on demand, containing an unconditional promise to pay a certain sum of money to the order of the payee (*Dictionary of Law*, 2nd edn, Peter Collin Publishing; Black's Law Dictionary). In banking terminology, the maker or plaintiffs in this case, are referred to as drawers, the defendant the drawee whilst Mercury Securities the payee.

For purposes of this case the issue of whether a cheque, in particular one that is crossed is a negotiable instrument or not must be resolved first. Poh Chu Chai when discussing negotiable instruments in *Law of Negotiable Instruments* 5th. edn at p. 3 had authored:

> Generally, a negotiable instrument will possess the three following characteristics. First, legal title to the instrument is freely transferable. Secondly, a transferee of the instrument is entitled to sue on the instrument in his own name. Thirdly, if the instrument comes into the hand of a bona fide transferee for value, the transferee acquires a title to the instrument better than that of the transferor (emphasis added).

S. Twum in *"Banking Law"* as regards a cheque, had included it as one of the negotiable instruments when he wrote:

> History of Negotiable Instruments
>
> (1) ...
>
> (2) ...
>
> (3) ...
>
> (4) The test by which negotiability is determined is that where an instrument is **by custom of trade transferable** like cash by delivery, and also capable of being sued upon by the person for the meantime holding it, then it is entitled to be considered negotiable (emphasis added).
>
> Types of Negotiable Instrument
>
> (i) (a) Bills of exchange including cheques (emphasis added).
>
> (b) Promissory notes.
>
> (c) Dividend warrants.

(d) Bearer bonds.

(e) Bearer scrip.

(f) Debentures payable to bearer (see *Bechuanaland Exploration Co v. London Trading Bank Ltd* [1898] 2 QB 658 (my inclusion)).

(g) Share warrants,

(h) Treasury bills.

Blackburn J in *Crouch v. The Credit Fancier of England Limited* [1872] 8 LRQB 374 in a more legalistic approach had approved *Miller v. Race* (1 Smith LC at 259, 2nd edn), in particular as regards a negotiable instrument, when His Lordship had remarked:

> It may therefore be laid down as a safe rule that where an instrument is **by custom of trade transferable, like cash,** by delivery, and is also capable of being sued upon by the person holding it pro tempore, **then it is entitled to the name of a negotiable instrument,** and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But that if either the above requisites be wanting, ie, **if it be either not accustomably transferable,** or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it pro tempore, **it is not a negotiable instrument,** nor will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt (emphasis added).

Suffice to say that a cheque is a bill of exchange, regardless of whether it is exchangeable like cash or not, as there is no requirement of easy transferability of right of property before qualifying as one. On the other hand, a cheque is a negotiable instrument only if all the prerequisites as illustrated by Blackburn J are present, among others, that said factor of easy transferability of property (see also *R.M.N.L Letchunan Chettiar v. A.L.V Alagappa Chettiar* [1934] 3 MLJ 5). It is trite that a crossed cheque is restricted contractually only between the drawer and the person named in that crossed cheque and never beyond that. No third party may benefit from it. That being so, regardless of the irrelevancy of mercantile law on negotiable instruments here, that impugned cheque, will still be subject to laws that bind a bill of exchange.

Even though the above analysis has satisfactorily elucidated that a cheque is a bill of exchange (and under s. 73 of the Bills of Exchange Act 1949 it is also likewise defined), whereby the law relating to bills of exchange will apply too to cheques, an appreciation of the comments of Scrutton LJ and Greer LJ in *Koch v. Dicks* [1933] 1 KB 307) will be highly useful. In the latter case, the plaintiff appellant had altered seven bills of exchange without the knowledge and consent of the defendant. The alteration was by changing the name of the city of "London", of England, to "Deisslingen" in Germany. The bills were in due course presented for payment and dishonoured and protested, and the plaintiff thereupon brought the action. Charles J had held that the place where the bills were drawn was a material alteration within the Bills of Exchange Act 1882, as the bills by the alteration, had changed from an inland bill into foreign bills and were therefore avoided by s. 64. The plaintiff being dissatisfied had lodged an appeal but eventually lost. In the course of the hearing certain pertinent observations were made which are highly relevant to the current case. Scrutton LJ at p. 320 had opined:

> I am of the opinion that any such alteration, even though it may be prejudicial to the party making the alteration, is an alteration which renders the bill void ...

At p. 322 His Lordship added:

> For these reasons, ... I have gone into at some length ... because the general principles are I think **of some importance with regard to negotiable instruments** ... and the appeal must be dismissed (emphasis added).

Greer LJ at p. 328 opined:

> For that reason, because these bills have been turned from inland bills into foreign bills, I think it must by necessity follow that the alteration must be material ... This language as to the material alteration of the bill is from a very ancient authority ... in *Pigot*'s case; ... that when any deed is altered in a point material ... be it by interlineations, addition, erasing, or by drawing of a pen through a line or through a midst of any material word, that the deed thereby becomes void ... That case has been often followed ... **which extends the doctrine from a deed to a bill of exchange** (emphasis added).

To wind it up, Wu Min Aun/Beatrix Vohrah in *The Commercial Law of Malaysia* had this to say on the matter:

> A cheque is a bill of exchange drawn on a banker and payable on demand. **Thus, the law relating to bills of exchange payable on demand will apply to cheques.** The words 'on demand' need not appear on the cheque as all bills of exchange are treated as payable on demand when no time is specified for payment (emphasis added).

It is trite that, apart from the relationship of a banker and the account holder being that of a debtor and creditor (with the banker being the debtor when the customer's account is in credit), the bank is the customer's agent in honouring cheques drawn by the customer upon his account (*Yogambikai Nagarajah v. Indian Overseas Bank* [1979] 1 MLJ SLR 258). The relationship between the banker and the customer is also one of contract, consisting of a general contract and special contracts, such as giving advice on investments to the customer and other duties eg, the banker's duty of secrecy (see the definition of 'customer' in *Oriental Bank of Malaya v. Rubber Industry (Replanting)* [1957] MLJ 153).

The banker is entitled to use the customer's money freely as his own, as in general there is no trusteeship or fiduciary relationship between them (except in certain specific instances). Yet once the customer demands payment, the banker must repay the amount demanded. The moment a customer draws a cheque the banker is under a duty to honour it up to the amount of his credit balance or any agreed overdraft. Invariably if that duty is breached, that customer may sue and claim substantial damages; as in this case, the banker may also run the risk of a defamatory suit where there are funds to meet the demand but alleged to have been wrongfully refused. A bank is not without recourse, as in certain circumstances it may reject that demand (*M/S Gupta Biscuits (P) Ltd. v. United Commercial Bank* [1988] AIR Col 265). That right may emanate from and in compliance of the agreement of parties, statutory law protection or even common law.

So, what are the circumstances the defendant bank may advert to, to reject payment of the cheque issued by the plaintiffs in the current case? I start off with the statutory provision, with particular reference to s. 64 of the Bill of Exchange Act 1949 (Act 204), which reads:

Alteration of bill

(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers:

> Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Returning to the mainstream ie, on the provision of s. 64 of the Act, it must be borne in mind that the terminology "bill" in s. 2 reads "bill means bill of exchange", with s. 3(1) of Part 11 supplying the definition. The latter reads:

> A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future a sum certain in money to, or to the order of, a specified person, or to bearer.

I am satisfied that the above definition sufficiently covers any cheque that carries the legend "cash", a cheque that has the name of the bearer on it, or even one that is crossed, including the impugned cheque. That being so, the current matter falls smack within the spirit of s. 64.

As supported by the above precedent of *Koch v. Dicks (supra)*, pursuant to s. 64(2), it follows that if a cheque has been materially altered, be it a change in the date, amount, the time of payment, the place of payment, name of payee or any crossing or any change that alters the business effect of that document, the bank may consider it avoided. In relation to this case, under s. 64(1) if that bill or the impugned crossed cheque was indeed materially altered without the assent of all parties liable on that document, that bill or cheque would be avoided, except as against a party who had himself made, authorised or assented to the alteration, and subsequent indorsers. As the plaintiffs had denied altering it or authorising or assenting

to it, what more with not a soul coming forward admitting likewise, then that cheque would be avoided for good. The drawee bank thus would be discharged of its contractual liability to pay up here.

I have used that word "appear" intentionally above, as under the proviso of s. 64, an exception has been legislated whereby the drawee bank may still have to pay up if the ingredients of the proviso are satisfied. In a gist, despite that material alteration, payment may still be enforced if the alteration is not apparent to the holder of the bill. As the term "apparent" has not been defined under the Act, allusion to other sources for assistance has to be undertaken. *The Dictionary of Law* by Peter Collin Publishing defines it as:

> adjective which can be seen; apparent defect = defect which can be easily seen ...

Black's Law Dictionary defines it as:

> That which is obvious, evident, or manifest; what appears, or has been made manifest. That which appears to the eye or mind; open to view; plain, patent.

In *Leeds and County Bank, Limited v. Walker* [1883] Vol. XI QBD 84 nothing was known of the alterations in a Bank of England note, until presented at the Bank of England, whereupon it was detected and that note rejected. There Denman J had remarked:

> By the word "apparent" I do not think it is meant that the holder only should not have the means of detecting the alteration. If the party sought to be bound can at once discern by some incongruity on the face of the note, and point out to the holder that it is not what it was, that is to say, that it has been materially and fraudulently altered, I think the alteration is an "apparent" one, even if it is not an obvious one to all mankind.

The above case saw support in *Bintai Kindenko Pte. Ltd v. Sanwa Bank Ltd & Anor* [1994] 3 SLR 459. Unfortunately there were other divergent views in the like of *Automobile Finance Corp. of Australia Ltd. v. Law* [1933] 49 CLR 1 and *Woollatt v. Stanley* [1928] All ER 106, where Salter J in the latter case had opined:

> The test which ought to be employed is this is the alteration of such a kind that it would be observed and noticed by the intending holder when he scrutinizes the document which he is contemplating taking and examines it as a negotiable instrument? A negotiable instrument is an important document and a person who proposes to become holder would naturally scrutinize it with reasonable care. If the intending holder on scrutinizing the document with reasonable care, would observe that it has been altered, then that constitutes an apparent alteration.

Assisted by the above elucidations, and enlightened by other authoritative sources, I am unable to accept in toto the view of either Denman J or Slater J. I am satisfied that "apparent" must mean that the material alteration in the bill is discoverable by simple inspection by the holder due to its obviousness. To arrive at that finding the holder is only aided by mere sight and without the necessity of resorting to other gadgets or means to confirm that alteration. Only the latter is empowered to posses that decision making right, and to apply his mind, a statutory privilege that is not extended either to the drawer or drawee. Apart from all the above preconditions, the bill must not be limited to negotiable instrument, and with the alteration not restricted to fraudulent acts.

If it was not apparent despite the material alteration, and the drawee bank pays up, could it debit the drawer's account subsequently? The answer is in the affirmative. In *London Joint Stock Bank Ltd v. MacMillan and Arthur* [1918] AC 777 a partner drew up a cheque for the sum of £2 payable to the bearer. Unfortunately, even though the figure was stated, the sum was not imprinted in words. An employee of that firm who misappropriated that cheque, not only had altered the figure to read as £120 but had also written the sum in words in the relevant space. He subsequently cashed that cheque. The House of Lords had held that as the firm was a customer of a bank, it was under a duty to take reasonable care in drawing his cheques, so as to guard against the possibility of alterations in the amount. As it was negligent when leaving blank space, where the amount should have been stated in words, and also by leaving blank spaces on either side of the figure "2", there was a clear breach of duty which the customer owed the bank. On that score the bank was entitled to debit the firm's account of that £120. This case in no uncertain terms had accentuated the need of a customer to exercise due care in drawing any cheque. On that premise, in the unlikely event of the bank here having made payment despite that material alteration, the plaintiffs' account could still be debited on the authority of the above case, if the latter had been negligent, or if all the requirements of the proviso had been satisfied (*Barbour Bank Ltd v. Ho Hong Bank Ltd* [1929] SSLR 116).

For purposes of this case, the holder of the bill is Mercury Securities, who after having received that document had presented it for payment. Regretfully no evidence was adduced to indicate whether Mercury Securities had actually and knowingly scrutinised the cheque, and knew of that material alteration before its presentation, or had merely as a matter of course, due to heavy volume of work had unguardedly or nonchalantly presented it for payment. This dearth of evidence certainly flies against the very interest of the plaintiffs. With no evidence adduced, and as the plaintiffs have not called Mercury Securities (the holder) to testify on their behalf, the plaintiffs' case was a non-starter. I cannot imagine Mercury Securities will lose much sleep over the unenforceability of the crossed cheque, as it has the contractual power of "forced selling" of those shares bought for the plaintiffs, the moment payment is not guaranteed. Either way it is a win-win situation for the holder, with any losses to be made up by the plaintiffs as "contra losses". In the circumstances of the case I cannot imagine Mercury Securities would want to be dragged into the personal affray of the plaintiffs, hence perhaps their non-involvement in this case.

It must be borne in mind that this proviso of s. 64 is specifically legislated to protect the innocent holder in certain special circumstances, who, for no fault of his, being the last person to possess that document, was in possession of a well concealed flawed bill. With the plaintiffs not qualifying as a holder as per the facts, they will be deprived of the right to lay claim to its protection.

It is my view that if the alteration were so obvious, and could be detected by the naked eye unaided by some equipment or person to confirm that alteration, the holder must at that stage withhold the cheque's presentation. That presentation is only excusable if the alteration on the cheque were not obvious. Structurally, before that presentment, the very construction of the law requires the holder to peruse first the cheque for any material alteration, and in the process applying his mind, but missing it for want of being apparent. Any failure must surely demand the shifting of the onus of perusal to somebody but not *vide* the route of s. 64.

If it were apparent, but still had escaped the scrutiny of the holder, and the law disallows or ignores the banker's view, but payment still being mandatory, that predicament would militate against all business logic. The banking system would shudder with nervousness in such a scenario, as every holder, crooked or otherwise, would have a ready answer of, "I have scrutinised the bill but unfortunately had failed miserably to detect that

alteration." Having perused the proviso meticulously, and having failed to identify any statutory right under the proviso, where then is the source of the defendant bank to deny payment in the circumstances of the case?

It is my finding that the power of the defendant to do that did not emanate from the proviso, but from the terms and agreement executed by both parties, as provided for in the "Rules of Current Account" (p. 23 of the Ikatan Document (E). Among others they provide:

> 9 ... the bank may dishonour cheques in which the alterations are confirmed by an incomplete signature or initial only (what more if there were no signatures or initials as in this case-mine);
>
> 21 ... the bank shall not honour any cheque with technical errors which include ...;
>
> 26 ... These rules are subject to review ... without prior notice to the customer. The customer shall be deemed to have knowledge of and shall be bound by the bank's current account rules ...;
>
> 27 ... Notwithstanding the above terms and conditions, the opening and operation of the account is also subject to the banking practice and laws of Malaysia (and thus subject to section 64 of the Act-mine), the Rules and Regulations of the Association of Banks in Malaysia and the rules and regulations of regulatory bodies set up by Bank Negara Malaysia.

At p. 25 of Ikatan Dokumen E is found one of the letters of the "Association of Banks in Malaysia" and in brief it reads:

> ...
>
> No alterations whatsoever shall be made on cheques. The bank reserves the right to dishonour and return cheques which in the bank's absolute opinion bear any form of alteration.

The ruling of the above mentioned p. 25 was effectively imprinted in the bank accounts of the plaintiffs eg, pp. 8 and 9 of Ikatan Dokumen (E). At p. 28 of the Ikatan Documen (E), in conformity of the above terms and rules, the defendant had returned the cheque unpaid, on account of it being altered ("altered cheque" hand written).

From the above terms, it would appear that the plaintiffs had transferred a bundle of rights to the defendant bank as per the agreements, including the right to reject any cheque on the above permitted terms.

Read together with the terms of agreement, where the bank is empowered to reject cheques flawed by technical defects, the subjective view of the banker thus must accordingly take a front seat. I am fully aware of the potential dangers of the latter view but I am not overly worried about it. The check and balance factors, the competitive factor of the business world, the excellent machinations of the banking system, the ever wary and watchful eye of the court (apart from the construction of the provision and terms of agreement), will surely stand guard against any exploitation of the situation.

To complete the picture, and having carried out some fact finding exercise, I am satisfied that that the impugned cheque has been altered or amended from a figure that looks like "7" or "8"to "9". This finding of fact does not require any external assistance, in the like of an expert from the Chemist Department, as it is too apparent for comfort. Mere sighting is more than sufficient for me to arrive at that conclusion because of that obviousness. The bank officer, PW1 likewise has held exactly the same view as mine, except for the non-mention of the figure "8" in his detection exercise.

Perusing the impugned cheque, a few other interpretations could be made pursuant to that alteration, among them being that the number of "7" or "8" had been altered but not ingeniously done to conceal its original shape. The figure of the first supposed "9" was differently shaped to the second "9". For all intents and purposes, the first figure of "9" had a shape of "7", later altered by the miscreant, by joining the top left tip of the "7" to the middle portion, thus amending it to appear like a triangle-shaped "9". Whoever the villain was, by that amendment the year had changed from "1979" or "1989" to "1999".

The other extreme but improbable interpretation could be that the impugned cheque was indeed prepared in "1979" or "1989" in the name of the payee, left in some drawer, and thereafter extricated in 1999 to be reutilised with the necessary amendments. If that did occur it could be assumed that, for some untoward reason that cheque was never sent to the payee during those early years. Even though that cheque could not qualify as a stale cheque, the amendment had vitiated it.

Additional to this, even the court had to bear in mind that in 1999 the trend of the share market was downward, and at best was fluctuating when a brief respite occurred. There were more glum faces than happy ones then. In shares transactions, it is the norm that when purchases are made, a grace period will be permitted prior to payment, but will be 'forcefully' disposed if not picked up within a given time. If the prices of the shares were to be

higher at the time of disposal as compared to the purchase prices, then the buyer was set to make a hefty profit; otherwise he was in negative territory. A serious player or investor with money will normally pick up those shares to avoid serious 'contra losses', and to unload them when the time is ripe. On the other hand, it is not unknown that when losses are heavy as a result of a mandatory disposal, these players for some rhyme or reason will contrive not to pay, and if unlucky will eventually be dragged into court by their stockbrokers. It is also not unknown for buyers in a losing market, to drag the issue, though outwardly making a show of paying but sending flawed cheques to the stockbrokers, hoping to delay disposal until the market picks up again. Even though the plaintiffs had money at that material time, and needless to say no evidence had been adduced of them behaving in the manner discussed earlier, the fact that it did cross the mind of the court merely highlights the unhappy predicament of the banker.

But is a change in the date here material? The answer is a resounding yes, as regardless of the status of the cheque whether it was stale or not, whether there was an attempt or not to gain some advantage from that deliberate alteration, and regardless of anyone being prejudiced, the fact that an alteration had occurred, had vitiated the cheque. What the eventual figure was supposed to be was irrelevant, as so long as an alteration had taken place over it, whereupon the period had changed, that part of the prerequisite of s. 64 had thus been complied with. In a gist, an amendment to a date is a material alteration in law (*Outhwaite v. Luntley* [1815] 4 Camp 179; *Hirschmann v. Budd* [1873] LTR 602; *Vance v. Lowther* [1876] LTR 286).

Returning to the subjective view of the banker, and regardless of the mind-boggling possibilities for the reasons of the alteration, it must have been a nightmarish experience for the relevant bank officer, to be faced with all the uncertainties and their ramifications at that inopportune moment. To allow payment, when there was an apparent material alteration, could incur the subsequent wrath of the customer for any losses, or even draw the eternal displeasure of his superiors, in the event the bank had to make reparations.

Even though I have stated that the subjective finding of the defendant takes center stage (pursuant to the terms of agreement), my factual finding is merely to confirm by analogy how right the defendant was in its conclusion. It had acted in accordance with the law and relevant agreement, and had not breached any of the high standards imposed by legal precedents, as when a subjective test was under scrutiny.

An evidential matter that requires comment is my finding that there were no cogent reasons made available for my consideration, to show that the defendant was duty bound to inform the plaintiffs every time an alteration was found. If every client unreasonably expects that treatment (unless some agreement says so), imagine the hours spent on the telephone line merely tracing and contacting a constantly mobile customer, let alone the time expended merely to obtain some clarification. With thousands of other cheques waiting in line to be processed, and with only a mere fluctuating RM479,327.51 in the current account, to act as bait to the defendant to provide the plaintiffs with sterling-quality service, at the expense of other customers, would surely have a long term negative effect on the defendant bank. When faced with that altered cheque what better way for the defendant to neutralize the situation than to stop payment.

Briefer still deserving comment is my finding of fact pertaining to the assertion of the plaintiffs that the defendant had endorsed the cheque with a prohibition of "our crossing cancelled", thus disallowing any form of disbursement of money. The defendant had totally denied the accusation, and I likewise was not convinced that the plaintiffs had been successful in proving it. In fact there were no cogent evidence adduced by the plaintiffs to establish that accusation, and by the admission of PW4 of having imprinted the legend "our crossing cancelled", the defendant was cleared of any accusation of being responsible for those words. The evidence was overwhelming that the rejection of the cheque based on that material alteration, was the only reason for it being dishonoured.

Based on all the reasons supplied above, I have no compunction in dismissing this claim with costs.